## IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEKSTROM, INC. and CHARAN		)	
MINHAS,		)	No. 464, 2006
		)	
	Counterclaim and Third	)	Court Below: Superior Court
	Party Defendants Below	)	of the State of Delaware in
	Appellants,	)	and for Kent County
		)	
v.		)	C.A. No. 05A-12-006
		)	
SAMEER K. SAVLA,		)	
		)	
	Counterclaim and Third	)	
	Party Plaintiff Below	)	
	Appellee.	)	

Submitted: January 17, 2006 Decided: February 5, 2007

Before STEELE, Chief Justice, HOLLAND and RIDGELY, Justices.

## ORDER

This 5<sup>th</sup> day of February, 2007, it appears to the Court that:

(1) This is an appeal by appellants and cross-appellees Tekstrom Inc. and Charan Minhas from a Superior Court decision which affirmed in part and reversed in part a Court of Common Pleas judgment in favor of appellee and cross-appellant Sameer K. Savla. Tekstrom initiated litigation in the Court of Common Pleas against its former employee, Savla, for breach of contract, seeking \$18,000 in damages. Savla counterclaimed for compensatory damages, punitive damages, attorney fees and costs for a variety of wrongful employment practices including

breach of the covenant of good faith and fair dealing; fraudulent employment practices; violation of 42 U.S.C. § 1981; intentional infliction of emotional distress; and violation of Delaware and federal minimum wage laws, 19 *Del. C.* § 902, and 29 U.S.C. § 206. At trial, the trial judge permitted Savla to amend his counterclaim to add Minhas, Tekstrom's former vice president and current president and owner, as a third-party defendant.

- (2) After a bench trial, the trial judge rejected Tekstrom's claim and awarded Savla \$91,200 in damages on certain counterclaims against Tekstrom and Minhas and \$73,711.25 in attorneys' fees under the Wage Payment and Collection Act. The trial judge, however, did not find that Tekstrom and Minhas violated 42 U.S.C. § 1981.
- (3) The parties appealed and cross-appealed to the Superior Court. That Court affirmed the Court of Common Pleas decision but reversed the trial judge's rulings that Minhas was personally liable for unpaid wages resulting from a breach of the covenant of good faith and fair dealing because Minhas did not control Tekstrom's operations during the events at issue. The Superior Court judge further found that Minhas was not an "employer" under the federal and Delaware Minimum Wage Laws.

<sup>&</sup>lt;sup>1</sup> 29 *U.S.C.* § 206.

<sup>&</sup>lt;sup>2</sup> 19 Del. C. § 902.

- (4) On appeal, Tekstrom and Minhas contend: (a) the Superior Court and Court of Common Pleas erred by finding that Savla justifiably relied on Tekstrom's and Minhas' misrepresentations; therefore, they could not be liable for unpaid wages; (b) the trial judge applied the incorrect test under the Fair Labor Standards Act when he determine that Savla was an employee; (c) the trial judge had no authority to award liquidated and compensatory damages under 19 Del. C. § 1103 "because Mr. Savla never asserted a claim for unpaid wages under Chapter 11 of Title 19 of the Delaware Code;" (d) the Superior Court judge erred by affirming Savla's intentional infliction of emotional distress claim because Savla did not prove bodily harm through an expert witness; and, (e) the Superior Court judge incorrectly affirmed the amount of attorneys' fees that the trial judge awarded to Savla. After consideration of the record, we find no merit in Tekstrom and Minhas's arguments and affirm the judgment of the Superior Court.
- (5) In his cross-appeal, Savla contends the Superior Court judge erred when he reversed the trial judge's decision that Minhas was personally liable for breach of the covenant of good faith and fair dealing. After consideration of the record, we find no merit in Savla's argument and affirm the Superior Court's ruling on that issue.

(6) The trial judge set forth the following relevant facts and the Superior Court judge adopted them:<sup>3</sup>

Savla is a twenty-six year old man from India who came to America in August of 2000 on a student visa. He graduated with a master's degree from the University of Houston in December 2002.

In December 2002, Tekstrom sent an email to the Indian Student Association for the University of Houston at Deer Lake, Texas. The email recited that Tekstrom had job openings and would process an H1-B visa quickly. The email had a link to Tekstrom's website and the web-site represented that Tekstrom had Fortune 500 companies as clients.

In response to this email, Savla sent his resume by email to Tekstrom and a few days later, Minhas, the vice president of the company, contacted Savla by telephone and interviewed him about his qualifications. Although Minhas testified that he had no recollection of the conversation, Savla testified that he was told that Tekstrom had job openings and would process the H1-B visa immediately. Two or three days later, Minhas called Savla and offered him an employment position and Savla was told to report to Dover, Delaware on or about January 17, 2003.

\* \* \*

Before the contract was signed, Minhas had a conversation with each of the persons concerning the contract. Each of the applicants in the group had questions about health insurance, but Minhas indicated that health insurance would start immediately. Although the contract provided that the company would not pay for any expenses concerning the visa, Minhas promised to obtain a visa for Savla. After Savla brought this matter to Minhas's attention, this language was stricken from paragraph 11 of the contract.

Both Savla and Ms. Dharani, another member of the training group, were told that the training would be for three weeks, and that after that

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<sup>&</sup>lt;sup>3</sup> *Tekstrom v. Savla*, 2006 WL 2338050, \*1- 3 (Del. Super.).

time they would be absorbed into ongoing projects. Each person in the training group was under the impression that when the contract was signed, he or she would receive a job.

\* \* \*

During this time in Dover, Savla stayed in an apartment in Dover Country Club Apartments. There was only one bed in this apartment and this bed was shared by two female employees who were participating in the training program. Savla slept on the floor in a sleeping bag provided by Tekstrom. Savla . . . stayed in the apartment under the above conditions for four months.

After training was completed, the group was told that they were not going to be absorbed into ongoing group projects. Savla and Dharani asked Minhas about their pay, health insurance, and visas, and they again received assurances from Minhas, but Minhas and Tekstrom never provided these items. . . .

In April 2003, Dharani left Dover and returned home. Minhas told Savla that if he tried to leave like Dharani he would make an example of him.

In late April 2003, Savla was contacted by Nirmal Ramaswamy of Aria Consulting, who was trying to fill a position for a vendor. Savla informed Ramaswamy that she should contact Tekstrom directly and negotiate a contract. Thereafter, Tekstrom negotiated a contract with Ramaswamy so that Savla could begin working at Bearing Point, New York. Before Savla left for New York, Minhas bought him a laptop computer at Sam's Club, but he did not provide him with any software. During his time in Dover, Savla was not paid by Tekstrom.

Savla began working at Bearing Point on May 5, 2003, and he worked at that client site project until May 23, 2003. On Friday, May 5, 2003, Savla sent an email to Minhas that requested information concerning his pay. On May 16, 2003, Savla again sent an email to Minhas and requested information concerning his pay and also told him he was having problems with the laptop. Minhas told Savla in a telephone conversation that Savla needed to come to Delaware to return the

laptop. Savla gave the laptop to a friend and requested that he mail it to Tekstrom.

\* \* \*

On May 18, or 19, 2003, Minhas wrote to Savla and requested that he provide Tekstrom with the address of Dharani because Tekstrom wanted to file a lawsuit against her. On May 23, 2003, Ms. Ramaswamy wrote to Satish Dola, president of Tekstrom, and requested a copy of Savla's H1-b visa, recent pay stubs, and a copy of the contract. On or about May 23, 2003, Satish Dola wrote to Ms. Ramaswamy stating that they were going ahead with the lawsuit against Savla and filing criminal charges in order to 'report to us and account for all of your actions and misactions, failing which we will start our legal course.' On May 23, 2003, Savla was so upset over the threats that he became sick to his stomach and testified that he really felt sick. He returned to Houston on that date to live with his fiancée.

\* \* \*

On June 10, 2003, Tekstrom filed a complaint against Savla seeking damages in the amount of \$19,397.24. Thereafter, Savla filed his counterclaim against Tekstrom and Minhas. At trial, Tekstrom abandoned its claim for conversion of the laptop computer and thereby reduced its claim to \$18,000.

(7) The trial judge ruled that Tekstrom could not recover on its claim of breach of contract against Savla because of its own material misrepresentations. Additionally, the trial judge found: (a) Tekstrom violated 19 *Del. C.* § 902, and as a result, Savla was entitled to lost wages and liquidated damages; (b) Tekstrom intentionally misrepresented the employment contract and violated the covenant of good faith and fair dealing, entitling Savla to compensatory and punitive damages; (c) Tekstrom intentionally or recklessly caused severe emotional distress, for

which Savla was entitled to recover compensatory and punitive damages; and, (d) Savla could not recover on his discrimination claim under 42 *U.S.C.* § 1981.

- (8) On appeal, the Superior Court reversed the trial judge's rulings that Minhas was personally liable for unpaid wages under the Delaware Wage and Labor Law and for breach of the covenant of good faith and fair dealing. The Superior Court affirmed the remainder of the trial judge's decision.
- (9) Tekstrom and Minhas first argue that both the Superior Court and Court of Common Pleas erred by finding that Savla justifiably relied on Tekstrom's and Minhas' misrepresentation. Specifically, Tekstrom and Minhas argue that because those misrepresentations were not in the contract that Savla signed, any reliance on the pre-contract promises was unreasonable.
- (10) Under Delaware law, a party must meet the following five requirements to succeed on a misrepresentation claim:
  - (1) false representation, usually one of fact, made by defendant; (2) defendant's knowledge or belief that representation was false or was made with reckless indifference to the truth; (3) intent to induce plaintiff to act or refrain from acting; (4) plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to plaintiff as a result of such reliance.<sup>4</sup>

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Lord v. Souder, 748 A.2d 393, 402 (Del. 2000) (The trial judge found that Tekstrom and Minhas falsely represented that Tekstrom had Fortune 500 companies as clients; that Savla would be absorbed into ongoing projects; that they would process his h1-B visa application immediately and sponsor him; that they would provide health benefits; and that they would provide single living accommodations during training. Evidence in the record supports these facts and Tekstrom and Minhas does not dispute those facts on appeal).

- (11) Tekstrom and Minhas's argument that Savla unjustifiably relied on their representations does not take into account the fact that many of the misrepresentations induced Savla to come to Delaware to work for Tekstrom before Minhas gave him the employment contract.<sup>5</sup> As the Superior Court judge noted, when Savla made the decision to come to Delaware, "no investigation would have shed any light on promises made to Savla that we would be absorbed into ongoing projects or given visa assistance. . . .[U]ntil he was handed a sleeping bag when he arrived in Delaware, he was under the impression that he would be living alone in a one-bedroom apartment." Furthermore, the contract itself specified that Tekstrom would process Savla's H1-b visa. Tekstrom did not follow through. There was nothing unreasonable about Savla relying on these representations.
- (12) Tekstrom and Minhas next argue that Savla was not an "employee" under the Fair Labor Standards Act.<sup>7</sup> We review the trial courts' construction of FLSA *de novo*.<sup>8</sup>
- (13) The FLSA provides that "[e]very employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of

<sup>&</sup>lt;sup>5</sup> See Tekstrom v. Savla, 2005 WL 3073671, \*4 (Del. Com. Pl.).

<sup>&</sup>lt;sup>6</sup> Tekstrom, 2006 WL 2338050 at \*12.

<sup>&</sup>lt;sup>7</sup> 29 *U.S.C.* §§ 203 (e) (1) (defining "employee"); (g) (defining "employ").

<sup>8</sup> Baldwin v. Benge, 606 A.2d 64, 67 (Del. 1992).

goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages . . . not less than \$5.15 an hour." The FLSA defines "employee" as "any individual employed by an employer" and the term "employ" as "to suffer or permit to work."

- (14) Tekstrom and Minhas contend that the trial judge applied an incorrect test to determine whether Savla was an employee. They argue that the proper test is one of "economic reality" as opposed to the *Martin v. Albrecht* 12 six factor test that the trial judge applied. Tekstrom and Minhas claims that the *Albrecht* test is used to distinguish between employees and independent contractors, and Tekstrom and Minhas have "never contended that Savla was an independent contractor."
- (15) The trial judge applied the following six factor analysis test outlined in *Albrecht*:
  - (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of performance of the

<sup>&</sup>lt;sup>9</sup> 29 *U.S.C.* § 206 (a) (1).

<sup>10</sup> Id. at § 203 (e) (1).

<sup>11</sup> *Id.* at § 203 (g).

<sup>&</sup>lt;sup>12</sup> 802 F.Supp. 1311, 1313 (W.D. Pa. 1992).

working relationship; (6) whether the service rendered is an integral part of the employer's business.<sup>13</sup>

As the court in *Albrecht* explained, "[i]t is a well-established principle that the determination of the employment relationship does not depend on isolated factors, but rather upon the 'circumstances of the whole activity.' The court has held that there are six factors to determine whether a worker is an 'employee.'" We believe the test may fairly be used to determine either whether a person is an employee or an independent contractor. Therefore, we conclude that the trial judge appropriately used and applied the *Albrecht* test when he determined that Savla was an employee.

- (16) Tekstrom and Minhas argue in the alternative that proper application of the *Albrecht* test reveals that Savla was not an employee under the FSLA because Savla was marketing himself to potential clients but not performing any services for the company. Moreover, they contend that the company never required Savla to look for work and that Savla never testified about his actual work while he was present at Tekstrom's offices.
- (17) The *Albrecht* factors help distinguish whether someone is an employee or an independent contractor or whether they are an employer at all

<sup>13</sup> Id. at 1313 (citing Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3<sup>rd</sup> Cir. 1991)).

<sup>&</sup>lt;sup>14</sup> *Id*.

under the FSLA. The absence or presence of any one factor is not determinative, because courts should "consider, whether, as a matter of economic reality, the independents 'are dependent upon the business to which they render service."<sup>15</sup> The reference to "independents" does not exclude reliance on the *Albrecht* factors to determine whether Savla was an employee in the first instance.

- (18) The trial judge found that Tekstrom required Savla to report to work every day from 9 a.m. to 6 p.m. If someone failed to report on time, Minhas or someone else from the company would call and inquire about the reason the worker was late. While present during business hours, Savla worked to secure a client to which he would later be assigned. As the Superior Court judge noted, "Tekstrom was a placement agency that worked with other agencies to place its trainees with an end client." Thus, one can fairly conclude from the record that Savla worked to advance Tekstrom's business.
- (19) Tekstrom and Minhas' rely on *Donovan v. American Airlines, Inc.*, <sup>17</sup> because the Court in *Donovan* held that trainees are not employees for purposes of the FSLA. However, *Donovan* is easily distinguished. Here, the trial judge

<sup>&</sup>lt;sup>15</sup> Selker Bros., Inc., 949 F.2d at 1293 (quoting Donovan v. DialAmerica, 757 F.2d 1376, 1382 (3d Cir. 1985)).

<sup>&</sup>lt;sup>16</sup> *Tekstrom*, 2006 WL 2338050 at \*7.

<sup>&</sup>lt;sup>17</sup> 686 F.2d 267 (5<sup>th</sup> Cir. 1982).

specifically found that Savla was not an employee during his training period.<sup>18</sup> Moreover, unlike here, the trainees in *Donovan* were not required to sign contracts entitling the training company to damages if the employee did not work for the company after training.

- (20) Tekstrom and Minhas next argue that the trial judge had no authority to award liquidated and compensatory damages under 19 *Del. C.* § 1103 "because Mr. Savla never asserted a claim for unpaid wages under Chapter 11 of Title 19 of the Delaware Code."
- (21) Delaware is a notice pleading jurisdiction.<sup>19</sup> Savla expressly sought damages under Section 1103 in his second amended answer.<sup>20</sup> Moreover, the facts alleged in the complaint, and proved at trial, support his claim under Section 1103. Thus, the Superior Court judge correctly noted that Savla's Section 1103 claim "was sufficiently raised to allow the trial court to properly rule upon it."<sup>21</sup>
- (22) Tekstrom and Minhas next argue that the Superior Court judge erred by affirming Savla's intentional infliction of emotional distress claim because

Tekstrom, 2005 WL 3073671 at \*5 ("I conclude that Savla was employed at the conclusion of the three-week training period.") (emphasis added).

<sup>&</sup>lt;sup>19</sup> *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

<sup>&</sup>quot;WHEREFORE, Sameer Savla demands judgment against Tekstrom and Charan Minhas for general compensatory damages, the value of the lost medical insurance, the value of lost wages and wage opportunities, prejudgment interest, double wages pursuant to 19 Del. C. § 1103, punitive damages, and attorney fees . . . ."

<sup>&</sup>lt;sup>21</sup> *Tekstrom.* 2006 WL 2338050 at \*15.

Savla did not prove bodily harm through an expert witness. Tekstrom and Minhas rely on *Rea v. Midway Realty Corp.*, <sup>22</sup> and its apparent requirement of proof of bodily harm in a claim for intentional infliction of emotional distress, to support their argument. We review claims of legal error *de novo*. <sup>23</sup>

(23) Tekstrom and Minhas's reliance on *Rea*, a Superior Court opinion, is inappropriate because *Rea's* holding became irrelevant after *Cummings v. Pinder*.<sup>24</sup> In *Cummings*, this Court held that "intentional infliction of severe emotional distress may provide the legal predicate for an award of damages, *even in the absence of accompanying bodily harm*, if such conduct is viewed as outrageous."<sup>25</sup> Thus, if Tekstrom and Minhas's actions were outrageous, Savla did not have to prove bodily harm, let alone establish injury resulting from bodily harm through an expert witness. The trial judge found that Tekstrom and Minhas's actions "should be regarded as intolerable in a civilized community."<sup>26</sup> That is, it is fair to say,

<sup>&</sup>lt;sup>22</sup> 1990 WL 35285 (Del. Super.).

Stroud v. Grace, 606 A.2d 75, 85 (Del. 1992) (quoting Gilbert v. El Paso Co., 575 A.2d 1121, 1142 (Del. 1990) "We analyze all legal issues de novo to determine whether the trial court 'erred in formulating or applying legal precepts."); see Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927, 930 (Del. 1982).

<sup>&</sup>lt;sup>24</sup> 574 A.2d 843 (Del. 1990).

<sup>25</sup> *Id.* at 845 (emphasis added).

<sup>&</sup>lt;sup>26</sup> *Tekstrom.* 2005 WL 3073671 at \*9.

about as outrageous as outrageous can be. Therefore, no expert medical testimony was required to establish injury resulting from bodily harm.

- by affirming the trial judge's award of attorney's fees. We review this claim for abuse of discretion. When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."
- (25) The trial judge held oral argument on this issue and wrote a separate opinion explaining in detail why certain fees were allowed and others disallowed. The trial judge expressly rejected Savla's argument that he was entitled to full attorney's fees based on the bad faith exception to the American Rule. The trial judge then carefully reviewed Savla's counsel's time records. In doing so, the trial judge specifically reduced time spent on claims other than Savla's Section 1103 claim. The trial judge approved the reduction that Tekstrom and Minhas requested, awarding one sixth of the total fees because the Section 1103 claim was

Dover Historical Soc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1089 (Del. 2006).

<sup>&</sup>lt;sup>28</sup> *Id.* (quoting *Chavin v. Cope*, 243 A.2d 694, 695 (Del.1968)).

one sixth of the total award.<sup>29</sup> The trial judge based the award of attorney's fees allowable under the statute on logic and reason and neither acted arbitrarily nor capriciously.

- (26) Savla contends that the Superior Court judge erred when he reversed the trial judge's decision that Minhas was personally liable for breach of the covenant of good faith and fair dealing. We review this claim *de novo*. 30
- (27) The trial judge, relying on *Hudson v. Wesley College*,<sup>31</sup> *Schuster v. Derocili*,<sup>32</sup> and *E.I. DuPont de Nemours v. Pressman*,<sup>33</sup> ruled that Minhas, acting as vice president of Tekstrom, was personally liable for Tekstrom's breach of the implied covenant of good faith and fair dealing. The Superior Court reversed, finding that contract law governs the implied covenant of good faith and fair dealing. Minhas, of course, did not enter into a personal contract with Savla. The Superior Court judge further found that because Minhas acted solely as a representative of Tekstrom, he could not be personally liable.

See Tekstrom, 2005 WL 3073671; See also Tekstrom, 2006 WL 2338050 at \*17 ("Although there were different legal theories, there was one common set of facts.").

<sup>30</sup> Stroud, 606 A.2d at 85.

<sup>&</sup>lt;sup>31</sup> 1994 WL 469138 (Del. Ch.).

<sup>&</sup>lt;sup>32</sup> 775 A.2d 1029 (Del. 2001).

<sup>&</sup>lt;sup>33</sup> 679 A.2d 436 (Del. 1996).

- (28) The Superior Court correctly reversed the trial court's holding that Minhas was personally liable. The covenant of good faith and fair dealing arises under contract. Because Minhas signed the employment agreement solely in a representative capacity for a disclosed principal, he could not be personally liable for the company's breach.<sup>34</sup> Further, Minhas was not an "employer" under the Minimum Wage Laws. While an officer can be an "employer" when he has operational control of the corporation's enterprise,<sup>35</sup> the undisputed evidence showed that Minhas was a vice president, reporting to the president, and that he did not control the company operations or personnel practices.
- (29) Savla next argues that the trial judge erred in his interpretation of the Section 1981 claim.<sup>36</sup> Specifically, Savla argues that the trial judge did not consider the 1991 amendments of Section 1981, which expanded Section 1981 to encompass not only contract formation, but also contract enforcement. Savla's argument is unavailing. The trial judge specifically found that Savla "has not shown that Tekstrom intentionally discriminated against him in violation of

<sup>34</sup> Brown v. Colonial Chevrolet Co., 249 A.2d 439 (Del. 1968).

United States Department of Labor v. Cole, 62 F.3d 775 (6<sup>th</sup> Cir. 1995).

<sup>&</sup>lt;sup>36</sup> 42 *U.S.C.* § 1981.

Section 1981."<sup>37</sup> There is nothing to suggest that the trial judge limited its review of the facts to contract formation and not to contract enforcement.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele Chief Justice

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<sup>&</sup>lt;sup>37</sup> *Tekstrom*, 2005 WL 3073671 at \*10.